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11 IN THE UNITED STATES DISTRICT COURT  
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
13 SAN FRANCISCO DIVISION

14 **BRADLEY M. HIXON,**

15 Plaintiff,

16 v.

17 **Correctional Officer J. CRUZEN,**

18 Defendant.  
19

C 07-6078 WHA

**DEFENDANT'S OPPOSITION  
TO PLAINTIFF'S REQUEST  
FOR ENTRY OF DEFAULT  
JUDGMENT**

20 **INTRODUCTION**

21 Plaintiff, a state prisoner at Salinas Valley State Prison filed a §1983 complaint on  
22 December 3, 2007. (Complaint, Docket No. 1). On January 10, 2008, the U.S. Marshal sent a  
23 request for a waiver of service of summons for Defendant to the litigation coordinator at Salinas  
24 Valley State Prison. (See Fritz Decl. ¶ 2). Salinas Valley State Prison received the waiver of  
25 service of summons on January 15, 2008. (See Fritz Decl. ¶ 3). On March 3, 2008, the waiver of  
26 service of summons was acknowledged, signed and mailed to the U.S. Marshal. (See Fritz Decl.  
27 ¶ 4). On March 6, 2008, Defendant filed a motion to request an extension of time to file a  
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dispositive motion until May 9, 2008. (Motion to Extend Time, Docket No. 12). On March 10, 2008, this Court granted Defendant's motion for extension of time to file a motion until May 9, 2008. (Order, Docket No.16). On March 10, Plaintiff filed a request for entry of default judgment. (Entry of Default Judgment, Docket No.17). On March 10, 2008, the Summons was returned as executed and acknowledged, dated March 3, 2008. (Summons, Docket No. 15)

Plaintiff's motion must be denied because Defendant is not subject to default judgment.

### MEMORANDUM OF POINTS AND AUTHORITIES

#### **PLAINTIFF'S REQUEST FOR DEFAULT JUDGMENT MUST BE DENIED BECAUSE THE REQUEST IS PREMATURE AND DEFENDANT IS NOT IN DEFAULT**

A federal court is without personal jurisdiction over a defendant unless the defendant has been served in accordance with Fed. R. Civ. P. 4; *Jackson v. Hayakawa*, 682 F.2d. 1344, 1347 (9th. Cir. 1982). Service of process under Fed. R. Civ. P. 4(e)(2) requires service of summons and complaint by either delivery of the summons and complaint to the individual, leaving copies at the individual's dwelling house or the usual place or abode with some person of suitable age and discretion residing there, or by delivering a copy of the summons and the complaint to an authorized agent. In addition, Fed. R. Civ. P. 4(e)(1) allows service by following state law, which under California law would include personal delivery to the defendant or an authorized agent, substitute service to someone at defendant's residence or place of business, service by mail with acknowledgment of receipt, and possibly service by publication. See Cal. Code. of Civ. Proc. §§ 415.10, 415.20, 415.30, 415.50.

In this case, Plaintiff falsely suggests that Defendant was personally served on March 8, 2008 under Fed. R. Civ. P. 4(e)2). This is not the case. On January 10, 2008, the U.S. Marshal sent a request for a waiver of service of summons for Defendant to the litigation coordinator at Salinas Valley State Prison. (See Fritz Decl. ¶ 3). On January 15, 2008, Defendant received the request for waiver of service of summons. (See Fritz Decl. ¶ 4). On March 3, 2008, the waiver of service of summons was acknowledged, signed, and mailed to the U.S. Marshal. (See Fritz Decl. ¶ 5). On March 10, 2008, the Summons was filed with the Court dated March 3, 2008. (Court Docket No. 15). According to Rule 4(d)(3) of the Federal Rules of Civil Procedure,

1 Defendants have until May 2, 2008, sixty (60) days from the date the waiver was sent, to file an  
2 answer to the complaint. Defendant also received an extension of time by this  
3 Court to file a dispositive motion, required by the screening order, until May 9, 2008. (Order,  
4 Docket No.16). Defendant, therefore, is not in default and the motion should be denied.

5 **CONCLUSION**

6 Plaintiff's motion for default judgment should be denied because Defendant acknowledged  
7 receipt and waived service of summons on March 3, 2008, and responded on March 10, 2008 by  
8 filing a motion to extend time to file a dispositive motion, which was granted. Defendant,  
9 therefore, is not in default.

10 Dated: March 14, 2008

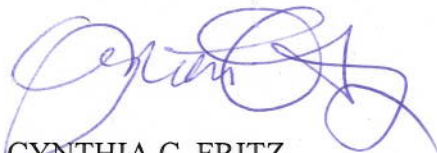
11 Respectfully submitted,

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